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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

GILBERTO ALVEZ and JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IN THE

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No.

AMERICAN EXPORT LINES, INC.,

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—against—

GILBERTO ALVEZ and JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner American Export Lines, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals, entered in this proceeding on April 3, 1979.

Opinions Below

The opinion of Justice Bernard Nadel of the New York State Supreme Court, Special Term, New York County, which denied the plaintiff's motion to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium, is not reported, and is printed in Appendix A, *infra.*

The opinion of the New York State Supreme Court, Appellate Division, First Department, which reversed Justice Nadel's decision and granted the motion to amend the com-

plaint is reported at 59 App. Div. 2d 883, 399 N.Y.S.2d 673 (1st Dep't 1977) and is printed in Appendix B, *infra*. The order of the New York State Supreme Court, Appellate Division, First Department, granting the motion of American Export Lines, Inc. to appeal to the New York State Court of Appeals is not reported, and is printed in Appendix C, *infra*.

The opinion of the New York State Court of Appeals which, in a 5-1 decision, affirmed the decision of the New York State Supreme Court, Appellate Division, First Department, is reported at 46 N.Y.2d 634, 415 N.Y.S.2d 979 (1979), and is printed in Appendix D, *infra*.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on April 3, 1979. This petition for certiorari was filed within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). [See also Supreme Court Rule 19(1)(a).]

Questions Presented

1. When deciding an issue of federal maritime law, should the New York State Court of Appeals be permitted to reject the established decisions of the Second and Fifth Circuit Courts of Appeal, the only federal appellate courts to address the issue of loss of consortium in a personal injury action?
2. Whether the application of the federal maritime law governing this action should be bifurcated, so that one result is mandated for all decisions of the lower New York Courts, while the opposite result can and has been reached by federal courts addressing the same issue?

3. Should an unfair, anomalous, and unnecessary distinction be created between the rights of injured longshoremen and the rights of injured seamen?

Statutes Involved

UNITED STATES CODE, Title 46:

§688 Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. [Jones Act]

§762 Amount and apportionment of recovery

The recovery in such suit shall be à fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. [Death on the High Seas Act]

Statement of the Case

Gilberto Alvez, an employee of respondent Joseph Vinal Ship Maintenance, Inc. lost an eye while working as a lasher aboard the SS EXPORT BUILDER, a vessel owned by petitioner American Export Lines, Inc., on October 13, 1972. He brought suit for negligence and unseaworthiness against the shipowner, which in turn impleaded Joseph Vinal Ship Maintenance, Inc.[1]

Alvez subsequently moved to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium. This motion was summarily denied by Justice Bernard Nadel of the New York State Supreme Court. On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint. Subsequently, that court granted the motion of American Export Lines, Inc. for leave to appeal to the New York State Court of Appeals, certifying the following question:

> "Was the order of this Court, which reversed the order of the Supreme Court an abuse of discretion as a matter of law?"

The New York State Court of Appeals, in a 5-1 decision, affirmed the New York State Supreme Court, Appellate Division, First Department, and permitted the cause of action for loss of consortium damages to stand, asserting that the federal maritime law on this question was unsettled, thereby permitting it to speculate as to what that law should or might be.

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[1] The employer third-party was impleaded prior to the effective date of the 1972 Amendments to the Longshoremen's & Harbor Workers Compensation Act, 33 U.S.C. §§901 *et seq.*, which, *inter alia*, eliminated the longshoreman's cause of action for unseaworthiness.

REASONS FOR GRANTING THE WRIT

I

The New York State Court of Appeals Rejected the Established Federal Maritime Law on Loss of Consortium as Determined by the Only Two Federal Appellate Courts to Address This Issue.

A. The Landmark Decision of the Second Circuit in *Igneri* Specifically Prohibits the Recovery of Loss of Consortium Damages by the Spouse of an Injured Longshoreman.

Any discussion of the issue of loss of consortium damages in maritime personal injury cases must commence with the landmark decision of *Igneri* v. *Cie de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964). There, Theresa Igneri sought to recover damages for loss of "compensation, support, love, affection and consortium," due to injuries suffered by her longshoreman husband. After an exhaustive review of the authorities, Judge Friendly affirmed the district court's dismissal of the loss of consortium cause of action and held that:

> "[T]he scheme of remedies, statutory and judicial, for injury to such maritime workers limits recovery to the person directly injured." *Id.* at 268.

That federal maritime law refuses to recognize loss of consortium damages in maritime personal injury causes of action has been recognized both prior and subsequent to *Igneri. See Christofferson* v. *Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976); *Westcott* v. *McAllister Bros.*, 463 F. Supp. 1039 (S.D.N.Y. 1978); *Wetters* v. *Moore-McCormack Lines*, [1977] A.M.C. 1529 (D. Md.); *Sanseverino* v. *Alcoa S.S. Co.*, 276 F. Supp. 894 (D. Md. 1967); *Pruitt* v. *M.S. Rigoletto*, 211 F. Supp. 295 (E.D. Mich. 1962); *Berga-*

maschi v. *Isthmian Lines, Inc.* [1959] A.M.C. 1862 (S.D. N.Y.); *Rogers* v. *City of New York*, 46 Misc. 2d 373, 259 N.Y.S. 2d 604 (Sup. Ct. 1965); *cf.*, *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978) (deceased seaman).

The *Igneri* rule, established sixteen years ago, denying recovery for loss of consortium to the spouse of an injured longshoreman, had been consistently followed until some courts, including the court below, mistakenly construed the decision of this Court in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), as having implicitly overruled it. *Gaudet*, however, dealt exclusively with a maritime wrongful death situation, having no direct effect upon the *Igneri* rule.

B. The Decision of This Court in *Gaudet* Has No Applicability to This Longshoreman's Personal Injury Action.

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court created a wrongful death cause of action under the general maritime law. *Gaudet* expanded the *Moragne* wrongful death remedy so as to include a claim for loss of consortium by a widow. The falsity of interpreting *Gaudet* as having any effect on the *Igneri* rule denying recovery in maritime personal injury situations may plainly be seen from even a superficial analysis of the Court's decision in *Gaudet*. Specifically, this Court held:

> "[U]nder the maritime *wrongful death* remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses." 414 U.S. at 584 (emphasis added).

No mention was made, nor inference created, that such a holding should be extended beyond the scope of a wrongful death situation. Indeed, this Court paid deference to *Igneri* as an authority against awarding damages for loss of consortium in a personal injury lawsuit by a court of admiralty. *Id.* at 589-90, n. 25. However, *Simpson* v. *Knutson*, 444 F. 2d 523 (9th Cir. 1971) and *In re United States Steel*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), which had refused to permit a widow to recover damages for loss of consortium, were dealt with succinctly, but nonetheless differently, by this Court:

> "Insofar as [they] are inconsistent with our holding, we disagree." *Id.* at 588, n. 23.

Even though *Gaudet* explicitly overruled *Simpson* and *United States Steel* on this issue, this Court nonetheless felt it necessary to specifically note that these cases were no longer accurate. However, no similar mention was made of *Igneri*. Instead, *Igneri* was cited for the proposition that loss of consortium damages could not be recovered in an admiralty personal injury case. Finally, rather than implicitly recognizing a cause of action for loss of consortium to the wife of an injured longshoreman, *Gaudet* all but explicitly rejects such a notion.

> "Obviously, the decedent's recovery did not include damages for the dependent's loss of services or of society, and funeral expenses. Indeed, *these losses—unique to the decedent's dependents—could not accrue until the decedent's death.*" *Id.* 591-92 (emphasis added).

Since *Gaudet* involved a maritime wrongful death action, and the present case instead deals with a maritime personal injury action, the decision of this Court in *Gaudet* is inapplicable herein, and should not be considered.

C. The Fifth Circuit, the Only Federal Court of Appeals to Consider the Effect of *Gaudet* on Loss of Consortium in a Personal Injury Case, Has Reaffirmed the *Igneri* Rule.

The holding of this Court in *Gaudet* did not imply that recovery would be permitted for loss of consortium arising out of an injury to, but not the death of, a maritime worker:

> "Restricting loss of society to that arising after the death of an injured maritime worker indicates no intention to create an action for loss of consortium under the general maritime law where the husband was not fatally injured." *Christofferson* v. *Halliburton Co.*, 534 F.2d 1147, 1150-51 (5th Cir. 1976).

The *Christofferson* court, the highest court yet to rule on the ramifications of *Gaudet*, clearly reaffirmed the continued validity of *Igneri*. There, far from interpreting *Gaudet* as having overruled *Igneri*, the court rejected the loss of consortium claim, holding that the validity of *Igneri* had not been affected by *Gaudet*, which had "implicitly limited a claim for loss of society to a maritime wrongful death action . . ." *Id.* at 1150. The court relied on the statutory prohibition in the Jones Act against anything but direct recovery by the injured seaman himself in a negligence suit, and on the principle that such a right was also nonexistent under the general maritime law. *See also Westcott* v. *McAllister Bros.*, 463 F.Supp. 1039 (S.D.N.Y. 1978); *Wetters* v. *Moore-McCormack Lines*, [1977] A.M.C. 1529 (D. Md.); cf., *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978) (deceased seaman).

Moreover, that *Igneri* was decided at a time when fewer states (25%) recognized a wife's right to loss of consortium than may do so presently (75%), does not in any way affect the continued validity of its rule. As Judge Friendly observed in *Igneri, supra* at 259-60:

> "Maritime law draws on many sources; when there are no clear precedents in the law of the sea, admiralty judges often look to the law prevailing on the land. See Gilmore and Black, Admiralty (1957), §1-16. At least this much is true. If the common law recognized a wife's claim for loss of consortium, *uniformly or nearly so*, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, *uniformly or nearly so*, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one." (emphasis added) (citations omitted).

Indeed, the court in *Christofferson, supra* at 1150, has answered a challenge on such grounds by noting:

> "[The] argument that *Igneri* would now be decided differently because a majority of the states now permit the recovery which the court denied in *Igneri* is without merit. . . . The *Igneri* court itself referred to common law which is uniform or nearly so. . . . Recognition of a wife's claim by some 37 states, however, does not mean that the common law is uniform or nearly so."

Additionally, the court recognized:

> "Much of the change in the law has come about through statutory modification of the law, rather than change in the common law." *Id.*

Therefore, the attempt by the court below to distinguish the facts in *Igneri* from the present case on the basis that more states now recognize actions for loss of consortium than did at the time *Igneri* was decided, is much too superficial. Without an indication of the reason for the change in the law, such a purported differentiation of *Igneri* is

simply incorrect, since a statutory modification indicates no necessary change in the common law.

After recognizing that the decision of this Court in *Gaudet* has no applicability to this case, or to any cases involving maritime injury rather than death, it is clear that the few cases declining to follow the *Igneri* rule were simply incorrectly decided.

In *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (1975), a California intermediate court permitted a wife's action for loss of consortium due to injuries received by her longshoreman husband. However, the authorities cited in *Pesce* were wholly misconstrued by that court, as it relied upon two death actions, namely *Gaudet* and *Skidmore* v. *Grueninger*, 506 F.2d 716 (5th Cir. 1975).

In *Giglio* v. *Farrell Lines, Inc.*, 424 F. Supp. 927 (S.D.N.Y. 1977), the District Court denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. Judge Lasker concluded that "compensation for [loss of consortium] may well be an idea whose time has come." *Id.* at 930. Acknowledging that his conclusion ignored *Igneri's* teachings, Judge Lasker certified the question for appeal to the Second Circuit, but on February 17, 1977, in an unreported opinion, the Second Circuit denied defendant's petition for leave to appeal, and Giglio's action has since been dismissed on the merits.

Finally, in *Lemon* v. *Bank Lines, Ltd.*, 411 F. Supp. 677 (S.D. Ga. 1976), Judge Lawrence aligned himself with the *Pesce* court, and denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. However, the rationale used by the district court in *Lemon* fails for the same reason as it does in *Pesce*. Indeed, such a failure was recognized by the court itself when it reversed its decision and dismissed the complaint on the authority of *Christofferson*, in an

unreported opinion on March 14, 1977, which decision was affirmed without opinion at 562 F.2d 1259 (5th Cir. 1977).

The present state of the law on the issue of loss of consortium damages in a maritime personal injury case was cogently stated by the court in *Wetters* v. *Moore-McCormack Lines*, 1977 A.M.C. 1529, 1536-37 (D. Md.). There, such a claim by the wife of an injured longshoreman was rejected, and the existing decisions on this point were analyzed:

> "With these conflicting precedents as background, the court must decide whether it will follow the law as established in *Igneri* and followed in *Sanseverino* or whether it will follow the holdings of *Pesce* and *Lemon*. This court holds that the reasoning of *Igneri* is still valid and that, therefore, the wife of an injured longshoreman may not recover damages for loss of consortium.
>
> In the first place, the reasoning of the decision of an intermediate California state court in *Pesce* and the lower federal court in *Lemon* is not so persuasive as to compel this court to abandon the law as established by *Igneri*. It seems to this court that *Pesce* and *Lemon* read too much into the Supreme Court's holding in *Gaudet*. As the court noted in *Christofferson*, the Supreme Court in *Gaudet* was concerned with recovery in wrongful death actions and not with recovery where the longshoreman was injured. *Lemon* and *Pesce* reason that there should be no distinction between the recovery allowed when a longshoreman is injured and that allowed when he is killed. However, there is a reason for that distinction, one that was noted by the court in *Igneri*."

As will be discussed in detail in Point II, this distinction refers to the statutory prohibition against recovery for

loss of consortium by the spouse of an injured seaman under the Jones Act, and the resulting inequality to permit such recovery by the spouse of an injured longshoreman.

D. The New York State Court of Appeals Has Thwarted the Uniformity Doctrine Applied to Maritime Personal Injury Actions, Mandating That New York State Courts Permit Loss of Consortium Damages.

Exclusive admiralty jurisdiction is granted to the federal district courts pursuant to 28 U.S.C. § 1333; however, that section also saves "to suitors in all cases all other remedies to which they are otherwise entitled." It is settled law that although this statutory language permits an injured maritime worker to choose between bringing his suit in state or federal court, federal maritime law will govern all such actions, wherever brought. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245-46 (1942); *Alvez* v. *American Export Lines*, 46 N.Y.2d 634, 638, 415 N.Y.S.2d 979 (1979).

The only two federal appellate courts to address the loss of consortium issue for an injured maritime worker, *Igneri* and *Christofferson*, *supra*, have denied recovery. The court below, acknowledging a disregard for such precedential authority (46 N.Y.2d at 641-42), tentatively set sail in what it considered to be uncharted waters and permitted recovery. Despite such trepidation in unfamilar territory, it effectively scuttled the doctrine of uniformity in the application of the federal maritime law. In its decision below, the New York State Court of Appeals held:

> "In assessing the impact of these cases upon resolution of the issue before us, we proceed cautiously cognizant that it is the general maritime law that governs the rights and liabilities of the parties. . . . Were this a case in which State law were applicable notwithstanding the existence of a Federal question . . . we would

> be free to render a decision on such Federal question differing from pertinent Federal court decisions save a controlling determination of the Supreme Court. . . . To be distinguished, however, are those unique areas, such as admiralty and maritime matters, which either by Constitution or Congressional legislation have been deemed to require a uniform body of national law. . . . In such areas not only does there exist a Federal question, but more importantly, an answer obtainable solely by recourse to Federal law. . . . Thus, notwithstanding the absence of a controlling Supreme Court decision, were there a uniform Federal rule, albeit one established by lower Federal courts, we would be bound in a case such as the one at hand to apply it." 46 N.Y.2d at 638-39 (citations omitted).

The court's opinion presupposes the lack of a uniform federal rule. In fact, there is a uniform federal rule established sixteen years ago in *Igneri*, referred to in *Gaudet*, and reaffirmed in *Christofferson*. Hence, by its own admission, the New York State Court of Appeals should have ruled that it was, in fact, "bound in a case such as the one at hand to apply it."

In effect, the decision below merely paid lip-service to the unquestioned governing nature of federal maritime law. The correct analysis of this point was expressed by Judge Jones in his dissenting opinion:

> "Were the Federal slate clean and were we therefore free to resolve the issue, it might well be that this argument, buttressed by the expanding recognition of loss of consortium at the common law, should be accepted. Again, however, it is our discipline to follow the controlling decisions of the Federal courts. In *Christofferson* v. *Halliburton Co.* (534 F.2d 1147) the

Circuit Court of Appeals for the Fifth Circuit not only adhered to the holding in *Igneri* but expressly concluded that *Igneri* was not overruled by *Gaudet*. In sum, whatever may be the differences of opinion among the Federal District Courts or the views expressed by other State courts, the only two Circuit Courts of Appeals which have addressed the issue have denied recovery for loss of consortium—one in our own circuit and the other, in the Fifth Circuit, which considered and rejected arguments that *Gaudet* had changed the law.

Not only, in my analysis, is the present state of the applicable Federal law clear, but even if it be recognized that Federal maritime law, as is true of most fields of the law, is and should be subject to the dynamics of appropriate growth and refinement, in my opinion the responsibility for such development properly rests with the Federal courts. Whatever may be our privilege, indeed our obligation, as a common-law court to share responsibility for the evolution and responsiveness of the common law, it is not fitting that we should venture decisional contributions to the developmental processes of maritime law which is characterized by peculiarities, even idiosyncracies. We are neither qualified by judicial experience nor, *inasmuch as any decision we hand down will have no precedential significance in the Federal courts,* can we be held jurisprudentially responsible for the determination which we decide to make." *Id.* at 644 (Jones, J. dissenting) (emphasis added).

Judge Jones recognized the conflict that the majority opinion would create between the "federal maritime law" as applied in New York State courts and in various federal courts. Indeed, if this Court does not review this matter,

the decision of the New York State Court of Appeals will never be reviewed. All lower New York State courts, of course, will be compelled to follow the rule established below by the New York State Court of Appeals. However, federal courts, in New York and elsewhere, would be free to follow the precedential authority of *Igneri* and *Christofferson*. The chaotic result in fragmenting the federal maritime law will lead to widespread forum shopping.

POINT II

The Decision of the New York State Court of Appeals Creates an Unfair, Unnecessary, and Anomalous Distinction Between the Rights of Injured Longshoremen and the Rights of Injured Seamen.

A. To Achieve Uniformity, Parity, and Fairness, Treatment Similar to Seamen Has Historically Been Afforded Longshoremen.

This Court, in *Seas Shipping* v. *Sieracki,* 328 U.S. 85 (1946) created for longshoremen a cause of action for unseaworthiness under the general maritime law. It was reasoned that the two classes of workers—seamen and longshoremen—engaged in a common pursuit for the shipowner, should be afforded the same protection under the law.

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the

> fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship". *Id.* at 99.

Hence, the Court elevated the status of longshoremen to that of their seamen prototypes.

In *Igneri* v. *Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964), the Second Circuit drew analogical support for its holding from the provisions of the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761 *et seq.,* and the Jones Act, 46 U.S.C. §688. After analyzing both Acts, Judge Friendly concluded that neither one permitted a non-pecuniary consortium recovery. Therefore, to avoid "capricious differences in treatment between similarly situated persons," the Court held that no such recovery was permitted the spouse of an injured longshoreman. As demonstrated herein, the decision below by the New York State Court of Appeals has destroyed this parity, creating a serious anomaly in the Federal Maritime Law and its guiding principle of uniformity.

B. Recovery For Loss of Consortium Is Not Permitted Under the Death on the High Seas Act (DOHSA).

Neither *Moragne,* which created a wrongful death cause of action under the general maritime law, nor *Gaudet,* which expanded the death remedy to include a claim for loss of consortium by a widow, involved DOHSA, since both involved accidents occurring within territorial waters. However, such an issue was faced by this Court in *Mobil*

Oil Corp. v. *Higginbotham,* 436 U.S. 618 (1978). There, this Court only had to look to the statutory language of DOHSA.

> "The recovery in such suit shall be a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought . . ." 46 U.S.C. §762 (emphasis added).

Since its provisions clearly limit the recovery permitted under DOHSA to "pecuniary loss," *Higginbotham* denied loss of consortium damages to the decedent's survivors. Indeed, no real determination had to be made:

> "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." 436 U.S. at 623.

Therefore, due to the clear applicability of DOHSA to deaths occurring beyond the territorial waters, recovery in such actions would be limited to "pecuniary loss"; however, if the death occurs within the territorial waters, damages for non-pecuniary loss, such as loss of consortium, may be recovered. *See id.* at 626 (Marshall, J., dissenting). Although a possibly anomalous result, after the decision in *Gaudet,* it was compelled by the statutory provisions of DOHSA.

C. Recovery For Loss of Consortium Is Not Permitted Under the Jones Act.

Although not as explicit as DOHSA, the statutory language of the Jones Act similarly precludes a claim for loss of consortium damages in a seaman's personal injury action. In pertinent part, the Jones Act provides:

> "*Any seaman* who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law . . ." 46 U.S.C. §688 (emphasis added).

As the Jones Act clearly states, the right to bring the action is limited to "any seaman." By definition, an action for loss of consortium must be brought by the spouse of a seaman, as such a claim is derivative from the main cause of action. Therefore, the Jones Act, by its statutory provision, does not apply to such an action for loss of consortium.

> "When Congress, in 1915, gave a seaman the right to recover for personal injury caused by his employer's negligence under the Jones Act, it did not authorize recovery by the seaman's wife for loss of consortium but restricted the cause of action to 'any seaman.'" *Christofferson, supra* at 1149.

See also Ivy v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978); *Igneri, supra; Westcott* v. *McAllister Bros.*, 463 F. Supp. 1039 (S.D.N.Y. 1978); *Wetters* v. *Moore-McCormack Lines*, [1977] A.M.C. 1529 (D. Md.). Indeed, as noted by *Ivy, supra* at 738, this Court in *Higginbotham* has also implicitly affirmed such an interpretation of the Jones Act in a wrongful death case:

> "By deciding that pecuniary damages could not be recovered by any of the plaintiffs, including the representative of Shinn [a Jones Act seaman], the Supreme Court decided sub silentio that a Jones Act seaman's beneficiaries cannot recover nonpecuniary damages for a death occurring on the high seas. Were nonpecuniary damages available under the Jones Act, although not under DOHSA, the Supreme Court would have affirmed as to Shinn while reversing as to the other plaintiffs."

Therefore, just as DOHSA precludes recovery for loss of consortium damages, so also does the Jones Act in both seamen's personal injury and wrongful death actions.

D. In the Interest of Uniformity, Parity, and Fairness, No Distinction Should Be Made Between the Rights of Injured Longshoremen and Injured Seamen.

In his landmark *Igneri* decision, Judge Friendly relied on the preclusion in the Jones Act against the maintenance of an action for loss of consortium by the spouse of an injured longshoreman:

> "The failure of the Jones Act to confer [the right to recover for loss of consortium] on the spouse of a seaman cannot be dismissed as an inadvertence". 323 F.2d at 266.

Therefore, to avoid both an anomalous situation, as well as "capricious differences in treatment between similarly situated persons," the court denied loss of consortium damages to the wife of an injured longshoreman.

> "Perceiving the anomaly in the rule which forbade a seaman, but not a harbor-worker, to recover for negligence against the ship, Congress largely ended the discrimination against seamen by passing the Jones Act; we should not create a new anomaly by giving the harbor-worker's wife a claim denied to the seaman's. . . . We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the Courts to construct one for the spouse of a negligently injured stevedore . . . .
>
> We can see no sensible basis for saying that although Congress ruled out a claim by the wife of a seaman against a palpably negligent shipowner, the wife of a

longshoreman can recover against a shipowner who has been wholly without fault." *Id.* at 267-68.

Instead of avoiding such an anomalous situation, however, the New York State Court of Appeals, in its decision below, created one, terming such anomalies "a currently accepted fact of life". 46 N.Y. 2d at 640-41. In support of this anomaly, the court cited the difference in recovery permitted by this court in *Gaudet* and *Higginbotham*. However, the New York Court failed to realize that such a comparison was not applicable to the case before it. When the applicability of DOHSA in such a situation first faced this Court in *Higginbotham*, the *Gaudet* decision that loss of consortium damages could be recovered in a maritime wrongful death action had already been made. The decision in *Higginbotham* was compelled by the statutory language of DOHSA; the only manner in which to avoid any distinctions therein would have been to overturn the prior *Gaudet* decision.

The situation presented to the New York Court of Appeals below, however, was exactly the opposite. There, instead of being faced with the applicability of a statute which would compel that a distinction be made, the court was given the opportunity to avoid an anomalous situation by following, in a longshoreman's personal injury action, the clear requirements of the Jones Act in such a seaman's action. Instead, the court chose to create an unfair, and wholly unnecessary anomaly.

It is true that denying recovery for loss of consortium here differentiates between the damages available for an injury, as opposed to the death of a longshoreman; however, this is exactly the point made in *Gaudet* when it specified that these damages could not accrue until death. Additionally, it avoids the only other possible choice,

namely the totally inequitable result of permitting the wife of an injured longshoreman to recover for loss of consortium, even though the wife of an injured seaman clearly cannot do so under the Jones Act. This issue was most recently thoroughly examined in *Wetters* v. *Moore-McCormack Lines* (1977) A.M.C. 1529, 1537-38 (D. Md.).

> "In *Igneri*, the court was concerned that there be no difference in the recovery allowed a seaman and one allowed a longshoreman. When a seaman is injured through negligence, his spouse has no claim for loss of consortium . . . .
>
> Thus, when Congress, in 1915, gave a seaman the right to recover for personal injury caused by his employer's negligence under the Jones Act, it did not authorize recovery by the seaman's wife for loss of consortium but restricted the cause of action to 'any seaman.' See *Christofferson, supra.* The court in *Igneri* reasoned that Congress did not want the wife of an injured longshoreman to recover for loss of consortium when the wife of an injured seaman could not so recover. This reasoning is still valid today, and the court is not convinced . . . that there should be any distinction between a longshoreman and a seaman in terms of damages for loss of consortium.
>
> In actions for wrongful death, damages for loss of consortium can be awarded under the general maritime law to the spouse of any maritime death victim, whether longshoreman or seaman. Therefore, in permitting damages for loss of consortium in wrongful death cases, the Supreme Court in *Gaudet* did not create any distinction between a longshoreman and a seaman . . . .
>
> As Congress in the Jones Act did not extend the recovery to the spouse of an injured seaman, this court will continue to limit the recovery of the spouse of an

injured longshoreman and will not permit that spouse to recover damages for loss of consortium. It appears to the court to be more equitable to follow *Igneri* than to permit the spouse of a longshoreman to recover for loss of consortium when the longshoreman is injured or killed when the spouse of a seaman can recover only when the seaman is killed."

Policy and logic, therefore, clearly evince that the decision below by the New York Court of Appeals, permitting recovery for loss of consortium by the wife of an injured longshoreman, even though such recovery is barred by the Jones Act to the wife of an injured seaman, created an unnecessary and unfair distinction, and should be reversed by this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari be granted (a) to assure that maritime workers, seamen and longshoremen alike, be treated evenhandedly before the law, and (b) to have this Court, not the state courts, settle the law on the subject.

Respectfully submitted,

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Of Counsel

Appendices

APPENDIX A

Opinion of New York State Supreme Court, Special Term, New York County

(August 17, 1976)

GILBERTO ALVEZ,

—against—

AMERICAN EXPORT LINES, INC.

The following papers numbered 1 to 9 read on this motion, No. 188 on Calendar of June 2, 1976.

	PAPERS NUMBERED
Notice of Motion—Order to Show Cause—and Affidavits Annexed	1–7
Answering Affidavit	8
Replying Affidavit	9

Upon the foregoing papers this Motion by the plaintiff for permission to amend his complaint and bill of particulars to assert a cause of action for loss of consortium is denied.

It is conceded that this action is governed by maritime law. Under maritime law, claims for loss of consortium are not available. Igneri v. Cie de Transports Oceaniques, 323 F. 2d 257.

Dated 8-13-76

(Illegible)
J.S.C.

County Clerk's No. 10898, 1975
Spec I Liber A66 Line 2, 1976

APPENDIX B

Opinion of New York State Supreme Court Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 29, 1977

Present

HON. THEODORE R. KUPFERMAN,
Justice Presiding,
" SAMUEL J. SILVERMAN,
" ARTHUR MARKEWICH,
" PAUL J. YESAWICH, JR.,
Justices.

GILBERTO ALVEZ,
Plaintiff-Appellant,
—against—

AMERICAN EXPORT LINES, INC.,
Defendant, Third-Party Plaintiff-Respondent,
—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,
Third-Party Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from the order of the Supreme Court,

Appendix B

New York County (Nadel, J.), entered on August 17, 1976, denying plaintiff's motion to amend his complaint and bill of particulars, and said appeal having been argued by Mr. Paul C. Matthews of counsel for the appellant, and by Mr. Stephen K. Carr of counsel for respondent American Export Lines, Inc., and by Mr. William M. Kimball of counsel for the respondent Joseph Vinal Ship Maintenance, Inc.; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, and the motion granted.

ENTER:

Clerk.

APPENDIX B (continued)

Order of New York State Supreme Court, Appellate Division, First Department

KUPFERMAN, *J.P.*,
SILVERMAN, MARKEWICH, YESAWICH, *JJ.*

1131N

GILBERTO ALVEZ,

Plaintiff-Appellant,

P.C.Matthews

—against—

AMERICAN EXPORT LINES, INC.,

Defendant, Third-Party Plaintiff-Respondent,

S.K.Carr

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,

Third-Party Defendant-Respondent.

W.M.Kimball

Order, Supreme Court, New York County (Nadel, J.), entered August 17, 1976, unanimously reversed, on the law, and the motion to amend the complaint granted, without costs and without disbursements. Plaintiff-appellant in this maritime personal injury action has sought to add his wife's cause for loss of consortium. Defendant-respondent relied on *Igneri* v. *Cie. Transport Oceaniques,* 323

Appendix B

F. 2d 257 (1963) to the effect that such causes are not available under maritime law, and Special Term agreed. We do not consider that the applicable law in its present state is so clearly against such a cause being advanced at the pleading stage of the case. Such causes are currently held acceptable, one such case being *Sea-Land Services* v. *Gaudet,* 414 U.S. 573, a wrongful death case. We know of no reason why this should not be acceptable in a personal injury case. See also *Pesce* v. *Summa Corp.,* 54 Cal. App. 3rd 86.

Order filed.

APPENDIX C

Order of New York State Supreme Court, Appellate Division, First Department, Granting Motion to Appeal to New York State Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 16, 1978.

Present

HON. THEODORE R. KUPFERMAN,
Justice Presiding,
" SAMUEL J. SILVERMAN,
" ARTHUR MARKEWICH,
" PAUL J. YESAWICH, JR.,
Justices.

M-88

GILBERTO ALVEZ,
Plaintiff-Appellant,

—against—

AMERICAN EXPORT LINES, INC.,
Defendant, Third-Party Plaintiff-Respondent,

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,
Third-Party Defendant-Respondent.

The above-named defendant, third-party plaintiff-respondent having moved for leave to appeal to the Court of

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Appendix C

Appeals from the order of this Court entered on November 29, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Stephen K. Carr and William M. Kimball and the communication of Stephen K. Carr, dated January 16, 1978 in support of said motion, and after hearing Mr. Stephen K. Carr and Mr. William M. Kimball for the motion, and no one appearing in opposition thereto,

It is ordered that said motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of this Court, which reversed the order of the Supreme Court an abuse of discretion as a matter of law?"

ENTER:

JOSEPH J. LUCCHI
Clerk.

APPENDIX D

Majority and Dissenting Opinions of New York State Court of Appeals

GILBERTO ALVEZ, Respondent, v AMERICAN EXPORT LINES, INC., Defendant and Third-Party Plaintiff-Appellant. JOSEPH VINAL SHIP MAINTENANCE, INC., Third-Party Defendant-Respondent.

Argued February 15, 1979; decided April 3, 1979

Stephen K. Carr & Gary D. Stumpp, New York City, for Third-Party Appellant.

William M. Kimball & Peter M. Prior, New York City, for Third-Party Respondent.

Paul C. Matthews, New York City, for Respondent.

OPINION OF THE COURT

JASEN, J.

To be resolved on this appeal is the question whether the wife of an injured harbor worker may seek recovery for loss of consortium occasioned by her husband's injury.

Respondent, while working as a ship's lasher aboard appellant's[1] vessel, the "Export Builder", was injured within the territorial waters of this State when struck by the handle of an allegedly defective tension jack, resulting in the enucleation of his right eye. After commencing this

[1] Appellant American Export Lines, Inc., impleaded respondent's employer, Joseph Vinal Ship Maintenance, Inc., as a third-party defendant.

action, respondent moved to amend his complaint to add his spouse, as a party plaintiff in an action for loss of consortium. Special Term denied respondent's motion, reasoning that the general maritime law does not afford a remedy for loss of consortium. The Appellate Division unanimously reversed, granted respondent's motion and certified the following question: "Was the order of this Court, which reversed the order of Supreme Court an abuse of discretion as a matter of law?" The order of the Appellate Division should be affirmed and the certified question answered in the negative.

In denying respondent's motion, Special Term relied entirely upon *Igneri v Cie. de Transports Oceaniques* (323 F2d 257, cert den 376 US 949), in which the Second Circuit held that the spouse of a longshoreman injured while working aboard a vessel in Brooklyn harbor had no cause of action for loss of consortium whether caused by negligence of the owner or unseaworthiness of the vessel. (323 F2d, at pp 265-268, *supra.*) In reaching this conclusion, the court observed that maritime law will often draw upon the law of the land where clear precedent does not exist in the former. With respect to recovery for loss of consortium, the court posited that if an admiralty court found that "the common law recognized a wife's claim for loss of consortium, uniformly or nearly so," it would query why it should not similarly recognize such a claim. (*Id.*, at p 260.)

Upon examining the state of the common law, the court found that although the great majority of States recognized the existence of a cause of action by a husband for loss of consortium, only 12 jurisdictions permitted a similar recovery by a wife. In light of the absence of a clear rule either permitting or prohibiting such recovery, the court turned to a consideration of which rule best comported with then

existing principles of maritime law. Relying primarly upon the unavailability of such relief to the wife of an injured seaman under the Jones Act (US Code, tit 46, § 688), the court concluded that it would be anomalous to permit recovery for loss of consortium by the wife of a longshoreman, whether on a theory of negligence or unseaworthiness. (*Id.*, at pp 265-268.)

In the years since the Second Circuit's decision in *Igneri*, maritime law has not remained static but, like the common law, has undergone significant change. In 1963, the year of the *Igneri* decision, the Supreme Court's decision in *The Harrisburg* (119 US 199, 213), still ruled the day, holding that maritime law did not afford a cause of action for wrongful death. However, in 1970, the Supreme Court overruled *The Harrisburg* and recognized the existence of an action for wrongful death under the general maritime law. (*Moragne v States Mar. Lines*, 398 US 375, 409.) In so holding, the court left for future consideration the precise scope of the remedy recognized. (*Id.*, at pp 405-408.)

Further delineation of the breadth of the wrongful death cause of action afforded by general maritime law soon followed in *Sea-Land Servs. v Gaudet* (414 US 573), wherein the court held that a decedent's dependents may recover for, among other elements of damage, loss of society, which the court defined as including a decedent's "love, affection, care, attention, companionship, comfort, and protection." (*Id.*, at p 585 [footnote omitted].) The court was careful, however, to exclude from the concept of society recovery for mental anguish or grief.[2] (*Id.*, at n 17.)

In assessing the impact of these cases upon resolution of the issue before us, we proceed cautiously cognizant that it

[2] With this definition in mind, the terms consortium and society will be used interchangeably.

is the general maritime law that governs the rights and liabilities of the parties. (*Romero v International Term. Operating Co.*, 358 US 354, 373; *Garrett v Moore-McCormack Co.*, 317 US 239, 245; *Celeste v Prudential-Grace Lines*, 35 NY2d 60, 62-63; *Matter of Rederi* [*Dow Chem. Co.*], 25 NY2d 576, 581, cert den 398 US 939; ALI Study of the Division of Jurisdiction Between State and Federal Courts, § 1316[b], at p 239 [Off Draft, 1969].) Were this a case in which State law were applicable notwithstanding the existence of a Federal question (see, e.g., *People v Payton*, 45 NY2d 300, 312), we would be free to render a decision on such Federal question differing from pertinent Federal court decisions save a controlling determination of the Supreme Court. (*People ex rel. Ray v Martin*, 294 NY 61, 73, affd 326 US 496.) To be distinguished, however, are those unique areas, such as admiralty and maritime matters, which either by Constitution or Congressional legislation have been deemed to require a uniform body of national law. (See, generally, Hart, Relations Between State and Federal Law, 54 Col L Rev 489.) In such areas not only does there exist a Federal question, but more importantly, an answer obtainable solely by recourse to Federal law. (Cf. *Teamsters Local v Lucas Flour Co.*, 369 US 95, 102.) Thus, notwithstanding the absence of a controlling Supreme Court decision, were there a uniform Federal rule, albeit one established by lower Federal courts, we would be bound in a case such as the one at hand to apply it.

It is, therefore, with great deference that we proceed to an analysis of the question before us. Critical to its resolution is the effect which *Moragne* and *Gaudet* have had upon general maritime law and in particular upon the continued validity of *Igneri*. Judicial interpretation of these developments has not been uniform, leaving uncertain whether

there presently exists a cause of action for loss of consortium in a personal injury action under the general maritime law. (Compare *Giglio v Farrell Lines,* 424 F Supp 927, mot for lv to app den No. 77-8014 [2d Cir, Feb. 17, 1977],[3] and *Lemon v Bank Lines,* 411 F Supp 677, dismd upon reconsideration in light of *Christofferson v Halliburton Co.,* 534 F2d 1147, affd without opn 562 F2d 1259, and *Pesce v Summa Corp.,* 54 Cal App 3d 86 [upholding cause of action for loss of consortium], with *Christofferson v Halliburton Co.,* 534 F2d 1147, *supra,* and *Wetters v Moore-McCormack Lines,* 1977 AMC 1529, and *Davidson v Reederei,* 295 So 2d 700 [Fla] [rejecting cause of action for loss of consortium].)

In our opinion, examination of the *ratio decedendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight. To begin with, unlike the state of the law of the land as to recovery for loss of consortium then prevailing, the great majority of States, including New York, now recognize such a cause of action by either husband or wife in a personal injury action.[4] In dispelling any argument

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[3] *Giglio* was subsequently dismissed in its entirety. (No. 75 Civ 6359, SDNY, Jan. 5, 1979, app pending No. 79-7078 [2d Cir.])

[4] The following States recognize a wife's cause of action for loss of consortium in a personal injury action either by statute or decisional law: (*Swartz* v *United States Steel Corp.,* 293 Ala 439; *Schreiner* v *Fruit & Equit. Life Assur. Soc.,* 519 P2d 462 [Ala]; *City of Glendale* v *Bradshaw,* 108 Ariz 582; *Missouri Pacific Transp. Co.* v *Miller,* 227 Ark 351; *Rodriguez* v *Bethlehem Steel Corp.,* 12 Cal 3d 382; Col Rev Stat, § 14-2-209; *Yoner* v *Adams,* 53 Del 229; *Gates* v *Foley,* 247 So 2d 40 [Fla]; *Brown* v *Georgia-Tennessee Coaches,* 88 Ga App 519; *Nichols* v *Sonneman,* 91 Idaho 199; *Dini* v *Naiditch,* 20 Ill 2d 406; *Troue* v *Marker,* 253 Ind 284; *Acuff* v *Schmit,* 248 Iowa 272; Kan Stat Ann, § 23-205; *Kotsiris* v *Ling,* 451 SW2d 411 [Ky]; Me Rev Stat, tit 19, § 167-A; *Deems* v *Western Md. Ry. Co.,* 247 Md 95; *Diaz* v *Lilly & Co.,* 364 Mass 153; *Montgomery* v *Stephan,* 359 Mich 33; *Thill* v *Modern Erecting Co.,* 284 Minn 508; Miss Code Ann, § 93-3-1; *Novak* v *Kansas City Tr.,* 365 SW2d 539 [Mo]; *Duffy* v *Lipsman-Fulkerson & Co.,* 200 F Supp 71; *Cooney* v *Moomaw,* 109 F Supp 448; NH Rev Stat Ann, § 507:8-a; *General Elec. Co.* v *Bush,* 88 Nev 360; *Ekalo* v *Constructive Serv. Corp.,* 46 NJ 82; *Millington* v *Southeastern Elevator Co.,* 22 NY2d 498; *Clouston* v *Remlinger Oldsmobile Cadillac,* 22 Ohio St 2d 65; Okla Stat Ann, tit 32, § 15; Ore Rev Stat, § 108.010; *Hopkins* v *Blanco,* 457 Pa 90; *Hoekstra* v *Helgeland,* 78 SD 82; Tenn Code Ann, § 25-109; W Va Code, § 48-3-19a; *Moran* v *Quality Aluminum Casting Co.,* 34 Wis 2d 542.)

that a wife does not have as great a right to her husband's consortium as he to hers, we stated: "'The gist of the matter is that in today's society the wife's position is analogous to that of a partner, neither kitchen slattern nor upstairs maid. Her duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort, the warmth of the home, she puts her arm and shoulder to the plow. We are not at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short, when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?'" (*Millington v Southeastern Elevator Co.,* 22 NY2d 498,

503-504, quoting *Montgomery v Stephan,* 359 Mich 33, 48-49.)

In addition to the absence of a rule at common law recognizing "a wife's claim for loss of consortium, uniformly or nearly so," (*Igneri v Cie. de Transports Oceaniques,* 323 F2d, at p 260, *supra*), the Second Circuit hinged its decision upon the anomaly it perceived in permitting a longshoreman's wife to recover for loss of consortium when the wife of an injured seaman would not be afforded a similar right under the Jones Act (US Code, tit 46, § 688). (323 F2d, at pp 266-268.) That such anomalies do exist in the remedies afforded injured maritime workers is, however, a currently accepted fact of life. For example, although the wife of a deceased longshoreman may recover for loss of consortium in a wrongful death action under the general maritime law (*Sea-Land Servs. v Gaudet,* 414 US 573, *supra*), recovery for wrongful death under the Death on the High Seas Act (US Code, tit 46, §§ 761, 762) is limited to pecuniary loss and does not afford a remedy for loss of a wife's consortium. (*Mobil Oil Corp. v Higginbotham,* 436 US 618.)

The Second Circuit's concern, in *Igneri,* with the absence of a clear common-law rule as to recovery for loss of consortium and with the avoidance of anomalous remedies in maritime law is clearly manifested in its observation: "If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute, denying such recovery to a seaman's wife. But, with neither of these conditions realized, our duty to avoid capricious differences in treatment between

similarly situated persons forbids our fashioning a rule that would place the spouse of a harbor-worker in a different, and better, position that the spouse of a seaman." (323 F2d, at p 267, *supra.*) We believe that the clear recognition by the law of the land of the right of a wife to recover for loss of consortium in a personal injury action, together with the recognition of such right in wrongful death actions under the general maritime law, exert, in the words of the Second Circuit, a "gravitational pull" of sufficient intensity to require recognition of respondent's claim. (See 2 Benedict, Admiralty [7th rev ed], § 12, pp 1-66—1-74; Comment, Loss of Consortium in Admiralty: A Yet Unsettled Question, 1977 BYU L Rev 133.)

In reaching this conclusion, we are cognizant that the Fifth Circuit has interpreted *Gaudet* (*supra*) as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions. (*Christofferson v Halliburton Co.,* 534 F2d 1147, *supra.*) Critical to the court's determination were two factors: first, its belief that recognition of a wife's claim for loss of consortium by 37 States is not indicative of a uniformity in the common law; and, second, its interpretation of *Gaudet* as holding that a cause of action for loss of consortium cannot accrue until the decedent's death. (*Id.,* at pp 1150-1151.)

With all due respect, we cannot agree with the *Christofferson* court's reasoning. Concerning the state of the common law, it is difficult to conclude that a clear rule authorizing a wife's recovery for loss of consortium in a personal injury action does not exist. In *Gaudet,* the Supreme Court surveyed State wrongful death statutes concluding that "[a] clear majority of States" permit recovery for loss of society. (414 US, at p 587, *supra.*) It supported this proposition by the finding that 27 of the 44 State and

territorial wrongful death statutes that measure damages by the loss sustained by beneficiaries permit recovery for loss of society. (*Id.*, at n 21.) In our view, it would be overly artificial to view the present state of the common law as to recovery for loss of consortium in a personal injury action as anything but nearly uniform. Moreover, we would also question the relevancy of the *Christofferson* court's statement: "Much of the change in the law has come about through statutory modification of the law, rather than change in the common law." (534 F2d, at p 1150, *supra.*) In our opinion, it matters little whether a State's recognition of the cause of action at issue is rooted in statute or decisional law.

As to the Supreme Court's reference to the accrual of a cause of action for loss of consortium, the factual setting in *Gaudet* is critical. There, the injured seaman had already recovered for his personal injuries prior to his death. Thereafter, his widow commenced a wrongful death action seeking as an element of damage recovery for loss of society. The trial court dismissed the action on the ground of *res judicata.* In affirming the reversal of this order by the Circuit Court of Appeals (463 F2d 1331), the Supreme Court stated: "Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death." (414 US, at pp 591-592, *supra.*) It is this language which the Fifth Circuit in *Christofferson* interpreted as implicitly limiting the right to recover for loss of consortium to wrongful death actions on the ground that a cause of action for loss of consortium does not accrue absent death. We would not read this language so broadly as it would appear to have been intended merely

to identify the widow's wrongful death action as an action separate and apart from the decedent's personal injury action, precluding application of *res judicata* principles.

In holding as we do today, we are sensitive to the limited role of the State court in maritime matters, bound as it is to apply Federal maritime law. In applying this body of law, we are equally sensitive to the well-settled principle that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." (*Moragne* v *States Mar. Lines,* 398 US 375, 387, *supra,* quoting *The Sea Gull,* 21 F Cas 909, 910.) Examination of current maritime law reveals, in our opinion, an absence of any established and inflexible rule barring recognition of the claim before us.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Jones, J. (dissenting). I am obliged to dissent in observance of what I perceive to be proper jurisprudential restraint. All agree that in this maritime action instituted in State court Federal maritime law governs. Our sole responsibility then is to determine the applicable Federal law. If the present state of such law is reasonably clear, we are not free to speculate what it may some day come to be.

In *Igneri v Cie. de Transports Oceaniques* (323 F2d 257, cert den 376 US 949) the Circuit Court of Appeals for the Second Circuit, within the territorial boundaries of which circuit our court sits, decided explicitly in 1963 that loss of consortium was not recognized under Federal maritime law. That determination is recognized as binding on the Federal District Courts within the Second Circuit (*Tornatore v Koninklijke Nederlandsche Stoomboot Maatschappij, N. V.*

"Sinon", USDCEDNY, Docket No. 75 C 69 [Dec. 6, 1976]; cf. *Giglio v Farrell Lines*, 424 F Supp 927, mot for lv to app den 2d Cir., Docket No. 77-8014 [Feb. 17, 1977]).* It is urged, however, that the decision of the Supreme Court of the United States in *Sea-Land Servs. v Gaudet* (414 US 573) in 1974 impliedly if not expressly overruled *Igneri*. Plaintiff constructs an appealing argument to support that conclusion. Were the Federal slate clean and were we therefore free to resolve the issue, it might well be that this argument, buttressed by the expanding recognition of loss of consortium at the common law, should be accepted. Again, however, it is our discipline to follow the controlling decisions of the Federal courts. In *Christofferson v Halliburton Co.* (534 F2d 1147) the Circuit Court of Appeals for the Fifth Circuit not only adhered to the holding in *Igneri* but expressly concluded that *Igneri* was not overruled by *Gaudet*. In sum, whatever may be the differences of opinion among the Federal District Courts or the views expressed by other State courts, the only two Circuit Courts of Appeals which have addressed the issue have denied recovery for loss of consortium—one in our own circuit and the other, in the Fifth Circuit, which considered and rejected arguments that *Gaudet* had changed the law.

Not only, in my analysis, is the present state of the applicable Federal law clear, but even if it be recognized that Federal maritime law, as is true of most fields of the law,

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* In *Giglio*, a panel of the Court of Appeals for the Second Circuit declined an express invitation to overrule *Igneri*. That the court thereby left standing the District Court's view that the time may have come for such overruling is not to be construed as approval or rejection of that view (cf. the denial of petitions for writs of certiorari by the United States Supreme Court). It is noted that the *Giglio* case has subsequently been dismissed in its entirety (USDCSDNY, Docket No. 75 Civ 6359 [Jan. 5, 1979]) and an appeal is now pending from that disposition (2d Cir, Docket No. 79-7078).

is and should be subject to the dynamics of appropriate growth and refinement, in my opinion the responsibility for such development properly rests with the Federal courts. Whatever may be our privilege, indeed our obligation, as a common-law court to share responsibility for the evolution and responsiveness of the common law, it is not fitting that we should venture decisional contributions to the developmental processes of maritime law which is characterized by peculiarities, even idiosyncrasies. We are neither qualified by judicial experience nor, inasmuch as any decision we hand down will have no precedential significance in the Federal courts, can we be held jurisprudentially responsible for the determination which we decide to make.

Accordingly, under constraint of the present state of Federal law, I would reverse the order of the Appellate Division and deny the motion to amend the complaint.

Chief Judge COOKE and Judges GABRIELLI, WACHTLER and FUCHSBERG concur with Judge JASEN; Judge JONES dissents and votes to reverse in a separate opinion.

Order affirmed, etc.